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The Jelly Beaner Challenge: How Attorneys Serving as Neutrals Identify and Coordinate the Ethical Mandates of the 2009 Rules of Professional Conduct with the Ethical Mandates of Dispute Resolution

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The Ethical Compass

The Jelly Beaner Challenge: How Attorneys Serving as Neutrals Identify and Coordinate the Ethical Mandates of the 2009 Rules of Professional Conduct with the Ethical Mandates of Dispute Resolution

By Elayne E. Greenberg

Many of us may remember as children trying to master the coordination game Jelly Beaner, a joust in which the player is challenged to pat his or her head up and down with one hand while simultaneously rubbing his or her belly in a circular pattern with the other hand.

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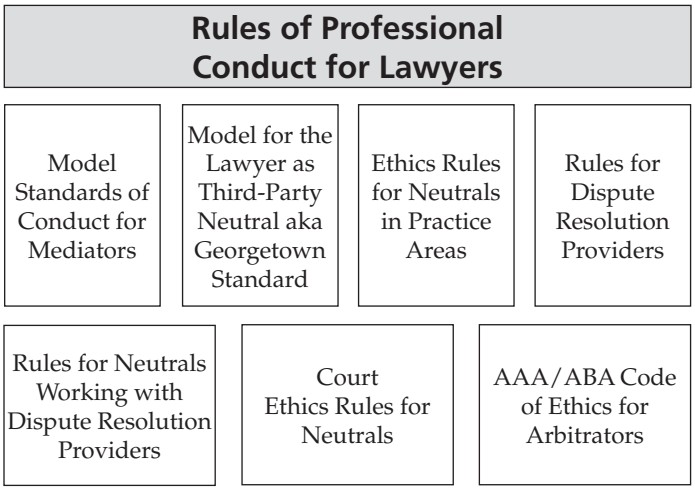
Competing movements, but with practice even those less coordinated can master how to synchronize their hands and play the game. So, too, those of us who are lawyers serving as neutrals are now engaging in a variant of the Jelly Beaner Challenge when it comes to discerning ethical behavior. How do we as third-party neutrals simultaneously follow the newly issued ethical mandates of the New York Part 1200 Rules of Professional Conduct for Lawyers that became effective April 1, 2009, while at the same time adhering to the relevant dispute resolution ethical guidelines? This column will elucidate the implications of three rules in the 2009 Rules of Professional Conduct that are applicable to third-party neutrals: conflicts, clarification of attorney/neutral role and confidentiality.[1] Then we will discuss how ethical practitioners may coordinate the mandates of the Professional Rules with the Model Standards of Conduct for Mediators, a representative ethics code for third-party neutrals.[2] We'll start off easy and progress to the greater challenges. Let's learn how to play.

Some fundamental background information may be helpful. Of course, first and foremost, we are lawyers, and as lawyers we are obligated to follow the Rules of Professional Conduct. What is sometimes forgotten is that our ethical obligations as lawyers remain with us even while we are serving as third-party neutrals. Moreover, when lawyers serve as third-party neutrals, we may be unnerved to discover that in addition to the Professional Rules for lawyers, multiple dispute resolution ethical codes are also applicable (*see diagram below).* Even more confounding, although each of these dispute resolution ethical codes offers its own brand of ethical wisdom, they fail to guide about how to interface with each other. The scale of this article requires that we limit our discussion to how the 2009 Rules of Professional Conduct affect neutrals' conduct and how these rules interface the Model Standards of Conduct for Mediators.



To begin, one of the ever-important issues, conflicts of interest, is addressed in Rule 1.12 of the 2009 Rules of Professional Conduct as it applies to *subsequent* employment limitations for those who have judged, arbitrated, mediated or served as another type of third-party neutral.[3] Rule 1.12 has economic implications not only for neutrals, but also for the firms that employ them.[4] As we may well appreciate, the integrity of dispute resolution processes is judged by the fairness of its procedures and the impartiality of its neutrals. Rule 1.12 seeks to preserve the integrity of dispute resolution processes proactively by signaling that while lawyers are serving as neutrals, they shall not conduct themselves in any way that garners future employment from one of the parties, and possibly taints the dispute resolution process as a whole.[5] Specifically, Rule 1.12 provides:

> (a) A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.

(b) Except as stated in paragraph (e), and unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:

(1) An arbitrator, mediator or other third-party neutral; or

(2) A law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral.

(c) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral.

(d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless the firm acts promptly and reasonably to:

(1) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(2) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(3) the disqualified lawyer is apportioned no part of the fee therefrom;

(4) written notice is promptly given to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and

(5) there are no other circumstances in the particular representation that create an appearance of impropriety.

(e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.[6]

A careful reading of the rule alerts that lawyers serving as neutrals may be precluded from subsequent employment with any of the parties in a matter that the lawyer personally and substantially had participated in as a neutral.[7] The rule distinguishes different neutral roles. For example, lawyers who were former judges are not allowed to subsequently represent a client on a matter in which that judge was involved in on the merits.[8] However, lawyers who have served as arbitrators, mediators, third-party neutrals, law clerks to a judge, other adjudicative officers and arbitrators, other than a partisan arbitrator, are precluded from representing anyone in a matter in which they participated personally or substantially in the aforementioned roles *unless* they have all parties' informed consent that is confirmed in writing.[9] Note that partisan arbitrators are allowed to subsequently represent a party.[10] Supposedly, it is understood that there is no expectation that partisan arbitrators are selected for their neutrality.

Of economic interest to firms that have members serving as neutrals, when a lawyer is disqualified from representation under this rule, the firm may also be precluded from representing the party *unless* it implements the specified safeguards.[11] The firm needs to construct a screen that prevents the transmission of any information between legal and non-legal employees of the firm and the attorney disqualified under Rule 1.12.[12] Expectedly, the disqualified attorney is prohibited from receiving any fees from this matter. Moreover, the firm must notify the tribunal and parties involved *in writing* about the screening procedures that have been instituted to ensure that they are able to monitor the firm's compliance with those procedures.

Rule 1.12 may have reverberating financial impact on neutrals and the firms that employ them as lawyers. As increasing numbers of attorneys foray into the dispute resolution practice while maintaining their existing legal practice, this will become a growing problem. Initially, many firms may have encouraged their members to expand their skills to include dispute resolution, believing that such diversification may open up economic opportunities for the firm. However, Rule 1.12 raises the possibility that this practice may in fact be an obstacle to overcome.[13] Rule 1.12 also leaves some questions unanswered. Is a former employee of a law firm who leaves the firm, but still leases space from that firm to conduct the dispute resolution business, still creating the appearance of being a member of the firm for Rule 1.12 purposes? Do the issues addressed in Rule 1.12 have a statute of limitations or do they exist in perpetuity?[14]

When we turn to the Model Standards of Conduct for Mediators, we see that the topic of conflicts of interest is also a focus, but with a different emphasis. Standard III, CONFLICTS OF INTEREST, addresses the subject matter in a broader time frame including: prior to, during and subsequent to the conclusion of the mediation. Let's see

how the Model Standards address conflicts of interest compared to Rule 1.12.[15]

Standard III (a) states,

> a mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute, or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.[16]

Then, Standard III (f) instructs,

> Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any way that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediation should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.[17]

We see that the Model Standards prohibit mediators from engaging in any relationship with any of the participants subsequent to the mediation if it would call into question the integrity of the mediation.[18] According to the Model Standards, the characterization of a conflict of interest may be subject to interpretation based on the criteria delineated.[19]

Getting back to our challenge of coordinating ethical codes, we see both the Professional Rules and the Model Standards attend to the management of conflicts of interest as vital to preserving the integrity of dispute resolution. However, Rule 1.12 delineates with greater specificity how mediators, arbitrators and other third-party neutrals and the law firms that employ them should address these conflicts.[20] Lawyers serving as third-party neutrals, aware of the broader focus of the Model Standards of Conduct for Mediators and the specific edicts of Rule 1.12, can integrate both codes' guidance into their ethical practice, knowing they have passed level one of the Jelly Beaner Ethical Challenge.[21]

Another issue of welcomed elucidation for third-party neutrals is the 2009 Rules of Professional Conduct Rule 2.4, which clarifies the distinction between the role of lawyers and lawyers serving as third-party neutrals.[22] Rule 2.4 provides:

> (a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
>
> (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.[23]

Rule 2.4 explains that lawyers who serve as third-party neutrals are helping parties resolve a dispute but they are *not* the attorney's clients.[24] Rule 2.4 makes a point of saying that lawyers serving as a third-party neutral have an ongoing obligation to inform unrepresented parties of this distinction.[25] The neutral is just the neutral, not their lawyer, too. Parties are not getting "two for the price of one" and lawyers may need to repeatedly dispel this commonly held, mistaken belief of *pro ses*. Such *pro se* statements to a third-party neutral as "I'm so glad you're working with me. You'll protect me"; "I don't know the law, but I'm sure you're not going to let me make a bad deal"; and "What do you think about that legal proposal?" are representative statements that call into action the Rule 2.4 requirements.

Rule 2.4 suggests that lawyers serving as third-party neutrals may need to review the frequency in which they clarify their role.[26] Many lawyers serving as third-party neutrals report that they always begin mediation and include in their Agreement to Mediate a statement that they are not the parties' lawyer. However, Rule 2.4 makes it clear that the responsibility to clarify may be ongoing, and once may not be enough.[27] Ethically conscious attorneys will have to vigilantly listen to *pro ses* to ensure that *pro ses* have a clear understanding of the third-party neutral's role.

Implicit in Rule 2.4 is a third-party-neutral's obligation to refrain from a conduct that might be misconstrued to be lawyerly.[28] If you say you are not acting as the parties' lawyer, then don't. This calls into question whether controversial practices such as evaluation and agreement

drafting by third-party neutrals might be in contravention of this rule. Moreover, this is another factor to be included in the ongoing debate that seeks to clarify the murkiness that sometimes exists between the role of a lawyer and the role of a neutral.

Although the Model Standards don't address the issue of clarification of roles with the specificity of Rule 2.4, the Model Standard VI(5), QUALITY OF THE PROCESS, addresses the issue in a more generic way. According to Standard VI(5):

> The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with the standard.[29]

With a cautionary note, Standard VI(6) warns:

> A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.[30]

Again, ethically minded lawyers who also serve as third-party neutrals may breathe a sigh of relief to find that the Professional Rules and Model Standards both address clarification of roles. However, we see that the Professional Rules impose a greater obligation on lawyers to ensure that *pro ses* understand the distinction between the role of lawyer and the role of a lawyer who is serving as a third-party neutral.[31] Another Jelly Beaner Ethical Challenge met!

Finally, the thorniest issue we are going to tackle is how lawyers serving as third-party neutrals balance their ethical obligation to report professional misconduct of their colleagues with their ethical obligation to maintain the confidentiality of the dispute resolution process. This is the ultimate Jelly Beaner Ethical Challenge.

According to Rule 8.3 of the 2009 Professional Code, REPORTING ETHICAL MISCONDUCT:

> (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
>
> (b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.
>
> (c) This Rule does not require disclosure of:
>
> (1) information otherwise protected by Rule 1.6; or
>
> (2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.[32]

Thus, Rule 8.3 obligates a lawyer to report another lawyer that "has committed a violation of the Rules . . . that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer. . . ."[33] As a reminder, lawyers serving as neutrals are included among the lawyers that *shall* report misconduct of another lawyer in a mediation or arbitration they are conducting.[34] Disclosure is exempted if the information is otherwise protected by Rule 1.6 or because it was made while the "judge or attorney was participating in a bona fide lawyer assistance program."[35]

One rule that third-party neutrals are likely to see violated in the dispute resolution context is Rule 4.1, TRUTHFULNESS IN STATEMENTS TO OTHERS. Rule 4.1 informs, "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.[36] Interestingly, Rule 4.1 prohibits false statements of fact or law that are *intentionally* made, not those out of ignorance.[37] Rule 4.1 is particularly noteworthy because the prohibition found in the rule covers any statement of fact, not just material statements as previously required.[38] Moreover, Rule 4.1 calls into question the accepted negotiation behavior by those who frequently make false statements as part of a negotiation strategy.[39] Is it possible that the 2009 Rules are raising the bar of truthfulness to a higher level than previously required? Connecting the dots, lawyers serving as third-party neutrals are obligated to report any false statements knowingly made by their colleagues in a mediation or arbitration.[40]

You may be wondering how this ethical mandate comports with the ethical mandate of the Model Standards of Conduct for Mediators on confidentiality. Closer examination of the Model Standards of Conduct for Mediators in Standard V, CONFIDENTIALITY, offers a helpful way for lawyers serving as mediators to address the issue.[41] The relevant parts instruct:

> A. A mediator shall maintain the confidentiality of all information obtained by

the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

* * *

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.[42]

We see that lawyers serving as third-party neutral may still honor the their ethical obligation to report the misconduct of our colleagues, which is required by Rule 8.3 of the Professional Rules, while preserving the confidentiality of mediation.[43] As explained in the Model Standards, at the onset of mediation the mediator may, in consultation with the parties, clarify which mediation communication will remain confidential and which will not.[44] If a lawyer serving as a mediator clarifies prior to the commencement of mediation that attorney statements that are a violation of the Professional Rules and will not receive the mediation confidentiality protection, parties will have a clearer expectation of what is able to remain under the mediation confidentiality umbrella.[45] Moreover, it will signal to attorneys participating in mediation to be more vigilant about the accuracy of the statements they utter in mediation.[46] Of curiosity, informal surveys conducted by this author of several hundred practicing neutrals at annual Bar Association meetings and dispute resolution trainings reveal that not one—yes, not one—neutral has ever reported a colleague for such false statements. Possibly this speaks to individual's personal ethical codes that are ever-present, but have not been explicitly discussed in this column. Another Jelly Beaner Challenge mastered!

As we are experiencing, the ethical landscape for lawyers serving as third-party neutrals is neither clearly defined nor internally consistent. Moreover, the context, values, and guidance offered by the 2009 Rules of Professional Conduct are different than the context, values, and guidance offered by such dispute resolution codes as the Model Standards of Conduct for Mediators. The Rules of Professional Conduct for Lawyers were reasoned from an adversarial paradigm in which lawyers function as zealous advocates in the context of litigation. Tenets of that code are zeal, client loyalty, partisanship, individual gain and non-accountability.[47] In direct contrast to the adversarial-based paradigm of the Professional Rules, the Model Standards of Conduct for Mediators, like other ethical codes for third-party neutrals, were promulgated to guide neutrals functioning in a non-adversarial context. The values reinforced in these non-adversarial ethical codes include: problem-solving, party self-determination, confidentiality, trust, openness and creativity.[48] Thus, there is no surprise that these foundational distinctions between the ethics codes for lawyers and the ethics codes for neutrals result in areas of convergence and divergence.

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Noted ethical commentators such as Julie MacFarlane,[49] Carrie Menkel-Meadow,[50] and Jacqueline Nolan-Haley[51] have raised the inadequacies of existing ethical codes for lawyers now practicing in more collaborative and non-adversarial ways and have called for a revamping of existing codes. Until then, as lawyers serving as third-party neutrals we need to be aware of the applicable ethical codes that may be relevant to our practice, vigilant about the differences, and decipher ways to integrate their mandates into a coordinated ethical practice.

Endnotes

1. 22 N.Y.C.R.R. Part 1200 R. 1.12 (2009); 22 N.Y.C.R.R. Part 1200 R. 2.4 (2009); 22 N.Y.C.R.R. Part 1200 R. 8.3 (2009).
2. *See* Model Standards of Conduct for Mediators Standard III (2005); *see* Model Standard of Conduct for Mediators Standard VI (5) (2005); *see* Model Standards of Conduct for Mediators Standard V (2005).
3. *See supra* note 1, at R. 1.12 (2009).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at R. 1.12 (a).
9. *Id.* at R. 1.12 (b).
10. *Id.* at R. 1.12 (e).
11. *Id.* at R. 1.12 (d).
12. *Id.*
13. *Id.*
14. *Id.*
15. *See supra* note 2, at Standard III (2005).
16. *Id.* at III (a).
17. *Id.* at III (f).
18. *Id.*
19. *Id.*
20. *See supra* note 1, at R. 1.12 (2009).

21. *Id.*
22. *See supra* note 1, at R. 2.4 (2009).
23. *Id.*
24. *Id.*
25. *Id.* at R. 2.4 (b).
26. *Id.*
27. *Id.*
28. *Id.*
29. *See supra* note 2, at Standard VI (5) (2005).
30. *Id.* at VI (6).
31. *See supra* note 1, at R. 2.4 (2009).
32. *See supra* note 1, at R. 8.3 (2009).
33. *Id.* at R. 8.3 (a).
34. *Id.*
35. *Id.* at R. 8.3 (c) (1).
36. *See supra* note 1, at R. 4.1 (2009).
37. *Id.*
38. *Id.*
39. *Id.*
40. *See supra* note 1, at R. 4.1 (2009).
41. *See supra* note 2, at Standard V (2005).
42. *Id.*
43. *Id.*; *see also supra* note 1, at R. 8.3 (2009).
44. *See supra* note 2, at Standard V (2005).
45. *See id.*
46. *See id.*
47. *See, e.g.,* Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1913–14 (Aug. 1998).
48. *Id.*
49. *See, e.g.,* Julie MacFarlane, *The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law*, 2008 J. DISP. RESOL. 61, 80 (2008) (noting the rise of adversarialism is at odds with many significant changes occurring in the legal practice).
50. *See, e.g.*, Carrie Menkel-Meadow, *Ethics in ADR Representation: A Road Map of Critical Issues*, DISP. RESOL. MAG., Winter 1997, at 3–4; *see also* Menkel-Meadow, *supra* note 47, at 1911–22.
51. *See, e.g.,* Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 799–804 (1999).

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